IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID I. KULP and HAROLD EARL LAYSON,	)	**No. 27876-0-III**
Respondents,	)	**Division Three**
v.	)	**UNPUBLISHED OPINION**
GOLDEN RESOURCES, INC., a Washington Corporation, d/b/a RANCH HAND TRACTORS,	)	
Appellant.	)	

Brown, J.—Golden Resources, Inc. d/b/a Ranch Hand Tractors, by its president, Raymond Cook, Jr., appeals the trial court's summary award of damages and grant of rescission of a tractor sales contract with David Kulp and Harold Layson. The court awarded Mr. Kulp and Mr. Layson $53,138.30 rescission damages for warranty breaches, $3,763.39 attorney fees and costs, and $180 attorney fees for responding to Golden Resources' frivolous defense. Golden Resources mainly contends the trial court erred in failing to grant a continuance to it and failing to consider Mr. Cook's pro se, unsworn materials opposing summary judgment. We find no error in the trial court's

decisions or in its awards of damages, costs, and attorney fees, including attorney fees for Golden Resources' frivolous defense. Accordingly, we affirm.

FACTS

Mr. Kulp and Mr. Layson bought a tractor and implements from Golden Resources, Inc., d/b/a Ranch Hand Tractors. They sued Golden Resources for violating the Consumer Protection Act (CPA), chapter 19.86 RCW, and for breaching an express warranty and implied warranties of merchantability and fitness for a particular purpose, seeking damages, rescission of their purchase, and attorney fees and costs under the CPA, because the tractor had multiple defects that prevented its use. Golden Resources, acting pro se through its president, Raymond E. Cook, Jr., denied selling a tractor to Mr. Kulp and Mr. Layson.

Mr. Kulp and Mr. Layson moved for summary judgment. A declaration by their attorney, Chris Montgomery, and an affidavit by Mr. Kulp supported the motion. Mr. Kulp's affidavit detailed specific facts and copies of the warranty, invoices, and receipts from Golden Resources. Mr. Montgomery's declaration related his conversation with Bob McEvoy, who worked on and inspected the tractor at issue. According to Mr. Montgomery, Mr. McEvoy would testify, if subpoenaed, that the tractor was objectionable and not fit for its intended purpose. The hearing on the motion for summary judgment was set for January 27, 2009.

Mr. Cook filed an unsworn declaration responding to the motion's hearing date. He informed the court, "I will be unable to

attend any HEARING, or respond in any way to the COURT or to the Plaintiffs, until at least the 2nd or 3rd week of February 2009. . . . If there must be a HEARING, please reschedule the HEARING for the middle to the end of February." Clerks Papers (CP) at 109-10. The declaration suggests Mr. Cook would be unavailable because he was taking a one-month trip.

Apparently before taking the trip, Golden Resources, again acting pro se through Mr. Cook, opposed summary judgment and moved to dismiss the action. The brief opposing summary judgment and an affidavit accompanying the motion to dismiss again denied that Golden Resources sold a tractor and implements to Mr. Kulp and Mr. Layson. It claimed that the express warranty, invoices, and receipts produced by Mr. Kulp and Mr. Layson were not from Golden Resources and denied any transaction.

Mr. Kulp and Mr. Layson rebutted Golden Resources' response to their motion for summary judgment by filing an affidavit authenticating their out-of-pocket expenses, invoices, and receipts from Golden Resources, and copies of cancelled checks they used to pay Golden Resources, which Golden Resources cashed. They argued the response and the motion were frivolous delay tactics. They alleged Mr. Cook's actions were deceptive and attached an unpublished opinion of a case involving Mr. Cook to support their allegation. They requested $180 in attorney fees for having to respond to Golden Resources' pleadings. Mr. Kulp and Mr. Layson moved to strike Mr. Cook's declaration responding to the notice of the summary judgment hearing and his affidavit supporting Golden Resources' motion to

dismiss, arguing that the declaration should be stricken because it was not notarized or certified under penalty of perjury, and that neither the declaration nor the affidavit stated the place of execution.

The court, listing "stricken" materials as considered, heard the motions as scheduled without clearly ruling on the continuance. It granted all relief requested by Mr. Kulp and Mr. Layson, striking Mr. Cook's affidavit and declaration and awarding judgment for $53,138.30, including $3,763.39 for attorney fees and costs, and an additional $180 for responding to Golden Resources' frivolous response and motion. Golden Resources appealed.

ANALYSIS

A. Summary Judgment

The issue is whether the trial court erred in granting summary judgment to Mr. Kulp and Mr. Layson by considering hearsay in Mr. Montgomery's supporting declaration and by rejecting Mr. Cook's unsworn affidavit and declaration.

Preliminarily, we review de novo a trial court's evidentiary rulings made in conjunction with a summary judgment motion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). A trial court may not consider inadmissible hearsay when ruling on a motion for summary judgment. *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986). "However, where no objection or motion to strike is made prior to entry of summary judgment, a party is deemed to waive any deficiency in [an] affidavit." *Smith v. Showalter*, 47 Wn. App. 245, 248,

734 P.2d 928 (1987). Golden Resources did not object to Mr. Montgomery's declaration at the trial court level. It, therefore, waived its right to challenge the declaration's deficiencies on appeal.

We turn to Golden Resources' next preliminary argument that the trial court erred by striking Mr. Cook's affidavit supporting Golden Resources' motion to dismiss and his declaration responding to the hearing date for the motion for summary judgment. Stevens County Local Civil Rule (LCR) 16(e)(4) requires that all affidavits and declarations be sworn under penalty of perjury:

> Affidavits or Declarations. All affidavits or declarations shall be sworn or affirmed under penalty of perjury, made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant or declarant is competent to testify to the matters stated therein.

Mr. Cook's declaration and affidavit were not signed under penalty of perjury. The trial court, then, did not err by granting the motion to strike the documents. An error here would have been harmless in any event because they raised no genuine issue of material fact.

The last preliminary matter is whether the trial court erred by denying a continuance to Golden Resources because of Mr. Cook's absence. This request was made in Mr. Cook's "stricken" declaration. A trial court has broad discretion to grant or deny a continuance; the court's decision will only be overturned for manifest abuse of discretion. *Donaldson v. Greenwood*, 40 Wn.2d 238, 242 P.2d 1038 (1952).

In his declaration, Mr. Cook

requested a continuance on Golden Resources' behalf. We have not been provided the record of where the trial court ruled on the request. And to the extent that the trial court may not have ruled, it abused its discretion. A trial court abuses its discretion when it fails to exercise its discretion. *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999).

However, Golden Resources is unconvincing when it suggests it was prejudiced by the trial court's failure to grant it a continuance. "An error is unduly prejudicial if it affects or presumptively affects the outcome of the trial." *Stiley v. Block*, 130 Wn.2d 486, 508, 925 P.2d 194 (1996). Golden Resources says it could have used the continuance to cure the technical defects in Mr. Cook's declaration and affidavit. Our record shows the same statements, if sworn, would not have changed the outcome.

Where, like here, a summary judgment motion supported by affidavits, must set forth specific facts showing a genuine issue for trial. CR 56(e). If he merely rests on the allegations or denials in his pleadings, summary judgment, if appropriate, shall be entered against him. CR 56(e). Mr. Cook's declaration and affidavit do not meet this standard. Therefore, the error was harmless. *Stiley*, 130 Wn.2d at 508.

Turning to the merits, we review de novo orders granting summary judgment. *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). We consider all facts and reasonable inferences in the light most favorable to the nonmoving party, Golden Resources. *Id.* Summary judgment is proper only if the pleadings, affidavits, depositions, and

admissions on file show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). In a summary judgment, fact questions may be decided as a matter of law if reasonable minds could reach but one conclusion about them. *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985).

Mr. Kulp and Mr. Layson sought to rescind their contract to purchase the tractor and its implements because of Golden Resources' breach of the implied warranty of merchantability, among other reasons. To be merchantable, goods must, in addition to other requirements, "be fit for the ordinary purposes for which such goods are used." RCW 62A.2-314(2)(c). Goods must be reasonably safe in their ordinary functioning. *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 427, 886 P.2d 172 (1994). A breach of this requirement constitutes a breach of the warranty of merchantability. *Id.* at 426. And a breach of the warranty of merchantability warrants rescission when the breach substantially impairs the value of the goods and the buyer accepted the goods because of the seller's assurances. *Thomas v. Ruddell Lease-Sales, Inc.*, 43 Wn. App. 208, 213, 716 P.2d 911 (1986).

From this record, reasonable minds could solely conclude Mr. Kulp and Mr. Layson purchased the tractor from Golden Resources with warranties and had so many problems with their tractor that it was difficult to use it for its ordinary purpose, e.g., digging ditches and pushing, lifting, and moving material. Golden Resources, therefore, breached its warranty of merchantability. *Fed. Signal Corp.*, 125 Wn.2d at 426. The breach substantially impaired

the tractor's value. Considering the plethora of documentary proof of the tractor sale and the warranty problems, the trial court did not err in granting summary judgment to Mr. Kulp and Mr. Layson.

B. Attorney Fees and Costs

We review de novo whether a trial court has authority to award attorney fees and costs. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 785-86, 197 P.3d 710 (2008). Attorney fees and costs may be awarded if a contract, a statute, or a recognized ground in equity authorizes them. *Id.* at 785.

Golden Resources contends the trial court should not have awarded Mr. Kulp and Mr. Layson attorney fees and costs under the CPA, chapter 19.86 RCW. While Mr. Kulp and Mr. Layson requested fees and costs under the CPA in their complaint and in one of their affidavits, the record does not show the court based its award on the CPA. Thus, we need not consider whether the CPA authorizes attorney fees. RAP 12.1(a). Rather, the court awarded attorney fees and costs through the prism of the Uniform Commercial Code-Sales, chapter 62A.2 RCW. Golden Resources does not argue that the UCC-Sales statutes do not apply.

And, Golden Resources challenges the trial court's $180 attorney fees award, assuming the award was based on RCW 4.84.185 because: (1) it is not supported by findings of fact; (2) it is based on an unpublished Court of Appeals' opinion; and (3) its pleadings were not frivolous. RCW 4.84.185 permits a trial court to award to the prevailing party reasonable expenses and

attorney fees after entry of summary judgment and upon a written finding by the court that the losing party's defense was frivolous and advanced without reasonable cause.

Like Golden Resources, we assume the award is based on RCW 4.84.185. The statute requires a finding that Golden Resources' defense was frivolous and advanced without reasonable cause. RCW 4.84.185. The trial court found:

> DAVID I KULP and HAROLD EARL LAYSON, shall be awarded Attorney Fees and Costs in the amount of $180.00 against . . . GOLDEN RESOURCES . . . , representing one (1) hour of legal preparation and time, in defending th[ese] frivolous and nonsense[ical] responsive pleadings filed by . . . GOLDEN RESOURCES.

CP at 210.

The record supports the court's finding. A defense that cannot be supported by a rational argument on the law or facts is frivolous. *Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707 (2004). Here, Golden Resources' defense is entirely frivolous. Golden Resources' sole defense was that it did not sell a tractor and implements to Mr. Kulp and Mr. Layson despite the plethora of contrary admissible documentary evidence produced by Mr. Kulp and Mr. Layson showing the sale and warranty problems. And, contrary to Golden Resources' suggestion, the record does not show that the trial court relied on the unpublished opinion attached to Mr. Kulp's and Mr. Layson's motion when making rulings. Further, the unpublished opinion has not been argued here. *See* GR 14.1(a) (prohibiting parties from citing unpublished Court of Appeals' opinions as authority). In sum, RCW 4.84.185 authorized the trial court's $180 attorney fee award

to Mr. Kulp and Mr. Layson.

For this appeal, Mr. Kulp and Mr. Layson request attorney fees and costs pursuant to the CPA, RCW 4.84.185, RAP 18.1, RAP 14.2, and RAP 14.3. RAP 18.1(a) permits an award of attorney fees and costs on appeal if "applicable law grants to a party the right to recover" them. RAP 14.2 and 14.3 authorize an award of costs, including statutory attorney fees, to the substantially prevailing party on appeal. Mr. Kulp and Mr. Layson have prevailed on each issue on review and are entitled to costs. We do not grant Mr. Kulp's and Mr. Layson's attorney fees request under RCW 4.84.185 for filing a frivolous appeal because we do not find the debatable issues of this appeal frivolous. *Fernando v. Nieswandt*, 87 Wn. App. 103, 112, 940 P.2d 1380 (1997). We find no authority in the CPA for awarding attorney fees here.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.